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In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-1557

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

JOHN KEVIN HURLEY,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

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JOHN KEVIN HURLEY,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

The petitioner, the Commonwealth of Massachusetts, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of Massachusetts entered in the case of *Commonwealth* v. *David A. Cobb* and *John Kevin Hurley*, to the extent that the judgment reversed the conviction of the defendant Hurley.

Opinion Below.

The opinion of the Supreme Judicial Court is reported in Mass. Adv. Sh. (1980) 59, and is set forth in the Appendix hereto (pages 1a-17a).

Jurisdiction.

The judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts was entered on January 9, 1980 (App. 1a), and the Commonwealth's petition for rehearing was denied on February 1, 1980 (App. 18a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

Questions Presented.

Has a sufficient showing of a conflict of interests, due to counsel's representation of a witness in unrelated matters, been made to conclude that the defendant was deprived of his right to the effective assistance of counsel?

Where the trial court neither required nor encouraged dual representation, can a defendant's post-conviction claim of denial of effective assistance of counsel be upheld absent a showing of specific prejudice from such representation?

Constitutional Provisions.

The Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

> cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 1 of the Fourteenth Amendment to the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case.

A jury found John Kevin Hurley and David Cobb guilty of the first-degree murder of Vincent Wines. At a party on the evening of January 10, 1976, Wines threatened Cobb with a pistol (Tr. 176, 369). After Wines apologized, the three men conversed amiably (Tr. 371, 204, 763-765). Upon returning to their residence, Cobb and Hurley telephoned Robert Andrews, president of the Reapers Motorcycle Club, ostensibly to obtain his permission to use club funds to purchase drugs from Wines (Tr. 710-714, 501). Shortly after 1 A.M. on January 11, the two returned to the party armed with guns. Cobb demanded Wines give him the pistol. Wines struggled with

Cobb for control of Cobb's rifle (Tr. 377-382). Hurley fired his shotgun, killing Wines (Tr. 724). The defendant claimed his motive for returning to the party was to purchase drugs, not to make a premeditated assault on Wines (Tr. 713-714). He contended his killing of Wines was a matter of self-defense (Tr. 722-726, 733).

Hurley retained Attorney Henry Quarles for the initial District Court hearing. Upon indictment in the Superior Court, Quarles was appointed to represent Hurley (App. 24a-25a). Prior to being retained, during the trial and after Hurley's conviction, Quarles represented the witness Andrews in various civil and criminal matters unrelated to the homicide (App. 23a-24a). Quarles did not serve as Andrews' counsel for the present case (App. 25a).

While called as a government witness, Andrews bolstered the defense's theory of the case by testifying that he gave permission to Hurley to buy drugs from Wines (App. 25a). The testimony of Andrews was identical to that of Hurley (App. 25a). Andrews was not at the party. Aside from the telephone conversation, Andrews' involvement was limited to advising Hurley after the shooting to procure an attorney and surrender himself (Tr. 510-512, 518-521, 733-737). Quarles was not restricted in his cross-examination of Andrews by any confidential information derived from the client-witness relationship (App. 26a, 27a). Indeed, Hurley's lawyer implicated Andrews in a possible conspiracy to violate the drug laws (App. 27a).

Hurley did not protest the nature of Quarles' relationship with Andrews before or during the trial. The defendant was aware of this relationship for it was through Andrews that Hurley secured Quarles (App. 24a). Two years after the trial, Hurley first raised his claim of ineffective assistance of counsel by filing a motion for a new trial (App. 19a-21a). Superior Court Judge Robert Beaudreau conducted a hearing on the motion and filed detailed findings of fact (App. 21a-28a).

Judge Beaudreau concluded that Hurley failed to demonstrate a conflict of interests or prejudice which inhibited his defense (App. 26a). Hurley pursued his claim on appeal. The Supreme Judicial Court held Hurley was denied his right to effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution (App. 3a-7a). The conviction of Cobb was affirmed.

Reasons for Review.

Claims of ineffective assistance of counsel resulting from defense attorneys being restrained by conflicts of interests have increased dramatically in the past decade. In 1976 Judge Pollack of the Southern District of New York termed such a claim one of "a spate of current petitions emanating from detention facilities" on the subject. *Bynum* v. *United States*, 422 F.Supp. 1153, at 1153 (S.D. N.Y. 1976). The Supreme Court first considered the issue in *Glasser* v. *United States*, 315 U.S. 60 (1942), and more recently in *Holloway* v. *Arkansas*, 435 U.S. 475 (1978). *Holloway* and *Glasser* were cases where the trial courts imposed on co-defendants, over their objection, the services of a single lawyer (joint representation). The present case is one of dual representation (a lawyer serving a defendant and a witness) not brought to the attention of the trial court. This case raises constitutional issues not resolved by *Glasser* or *Holloway*, but nonetheless of equal public importance given the continuing proliferation of claims of ineffective assistance due to conflicts of interests (quickly illustrated by the frequent citation of *Holloway* recorded in Shepard's Citations).

The petitioner seeks review of a state appellate court opinion which determined, as a matter of constitutional law, that

the quantum of proof of a conflict was sufficient to deprive the defendant of effective assistance of counsel. In *Holloway* v. *Arkansas*, this Court recognized that the controversy presented by this petition had created differing standards of proof among appellate courts, but the issue was expressly left unresolved (435 U.S. at 483). This petition presents an appropriate case for the consideration of the issue because of the clarity of the facts of the case and, in the view of the Commonwealth, the erroneous quantum of proof held below to violate the Sixth Amendment.

The level of proof sufficient to establish a conflict of interests so as to deprive a defendant of effective assistance of counsel varies greatly among the Federal Circuit Courts. The First Circuit required, in a dual representation case, that a real conflict or specific instance of prejudice be shown by the defendant. *Miller* v. *United States*, 564 F.2d 103, 106 (1st Cir. 1977), cert. den. 435 U.S. 931 (1978); *United States* v. *Donatelli*, 484 F.2d 505, 507 (1st Cir. 1973). Such is the rule of *United States* v. *Lovano*, 420 F.2d 769, 773 (2d Cir. 1970), cert. den. 397 U.S. 1071 (1970), a case of joint representation. To demonstrate an actual conflict to warrant reversal, the Fifth Circuit recently stated that "[t]here must be a significant divergence in the interests of the jointly-represented persons." *United States* v. *Risi*, 603 F.2d 1193, 1195 (5th Cir. 1979). A significant divergence of interests between co-defendants which might reasonably have resulted in prejudice to the claimant is the Fourth Circuit test for joint representation not objected to at trial. *O'Kelley* v. *North Carolina*, 606 F.2d 56, 57 (4th Cir. 1979). A less abstract standard is found in *United States* v. *Mavrick*, 601 F.2d 921, 930 (7th Cir. 1979), wherein the Seventh Circuit required that the defendant demonstrate, with a reasonable degree of specificity, that a conflict of interests actually existed at trial. A more speculative test is found in *United States ex rel. Hart* v. *Davenport*, 478 F.2d 203, 210 (3d

Cir. 1973), for upon a showing of a possible conflict of interests or prejudice, however remote, joint representation is regarded therein as "constitutionally defective." *United States ex rel. Horta* v. *DeYoung*, 523 F.2d 807, 808-809 (3d Cir. 1975). J. Skelley Wright resolved the issue by analogizing it to a standard of reasonable doubt in *Lollar* v. *United States*, 376 F.2d 243, 247 (D.C. Cir. 1967):

> [O]nly where "'we can find no basis in the record for an informed speculation' that appellant's rights were prejudicially affected," can the conviction stand.

The controversy is mirrored in state court opinions, as the following cases illustrate. Possible conflicts of interests were held sufficient to reverse a conviction in the dual representation case of *People* v. *Stoval*, 40 Ill.2d 109 (Sup. Ct. 1968), but see *People* v. *Gregory*, 73 Ill.App.3d 127 (App. Ct. 1979), wherein an actual conflict test was applied to a case of joint representation. In *People* v. *Macerola*, 47 N.Y.2d 257, 391 N.E.2d 990, 993 (Ct. App. 1979), a significant possibility of a conflict was sufficient to warrant reversal in light of the trial judge's failure to inquire into joint representation. In order to receive a new trial based upon a conflict of interests, appellants in Pennsylvania courts must show that a conflict arose and actually existed during the trial, and that the conflict was "of a type which created a potential of harm with regard to the accused's defense." *Commonwealth* v. *Bracero*, 396 A.2d 709, 711 (Pa. Super. 1978). A claim of conflict must have a factual basis establishing that a conflict of interests actually existed between co-defendants and must not be grounded in speculation and conjecture, according to the Connecticut Supreme Court. *State* v. *Marion*, 175 Conn. 211, 397 A.2d 533, 536 (1978). New Hampshire courts apply a test of remote pos-

sibility of prejudice in cases of joint representation and a test of real conflict or specific prejudice in non-simultaneous dual representation cases. *State* v. *Theodore*, 392 A.2d 122, 123 (N.H. Sup. Ct. 1978). In a previous dual representation decision, the Massachusetts Supreme Judicial Court required that a real conflict or specific instance of prejudice be shown. *Commonwealth* v. *Adams*, Mass. Adv. Sh. (1978) 795, 806. Also see Annot., "Propriety and Prejudicial Effect of Counsel's Representing Defendant in Criminal Case Notwithstanding Counsel's Representation or Former Representation of Prosecution Witness," 27 A.L.R.3d 1431 (1969), and Annot., "Circumstances Giving Rise to Conflict of Interest Between or Among Criminal Codefendants Precluding Representation by Same Counsel," 34 A.L.R.3d 470 (1970).

The present case only compounds the confusion as to the appropriate quantum of proof to warrant reversal for a conflict of interests. The lower court opinion states a genuine conflict clearly existed but in the same paragraph terms the situation one of "potential conflict" (App. 5a). No manifestation of the conflict in the record of the trial is shown. No indication appears that Quarles "struggle[d] to serve two masters," compare *Glasser* v. *United States*, 315 U.S. 60, 75 (1942). Neither Quarles' friendship with Andrews nor their attorney-client relationship demonstrates the existence of divided loyalties affecting Hurley. Any suggestion that Quarles sought to protect Andrews from an accessory charge at Hurley's expense is not founded in the facts of the case. According to Hurley, Andrews simply sanctified a drug purchase. Andrews counseled Hurley to obtain a lawyer and surrender (Tr. 510-512, 518-521, 733-737). Hurley failed to testify at the hearing on the motion for a new trial, leaving the allegations of his motion for a new trial without an evidentiary foundation. To assert that Andrews was an accessory is to speculate as to facts not in the record, or to assume that Hurley perjured himself. Apparent-

ly the Supreme Judicial Court's judgment derives from the speculation that Hurley's attorney was potentially inhibited from cross-examining Andrews. While possibly meeting the standard of *United States ex rel. Hart* v. *Davenport, Lollar* v. *United States,* and *People* v. *Stoval,* this case falls short of the test in *Miller* v. *United States, United States* v. *Lovano, United States* v. *Risi* and *United States* v. *Mavrick.*

The petitioner submits that the state court erred in reversing Hurley's conviction as a matter of constitutional law. This court placed great emphasis in *Holloway* v. *Arkansas* on the role of the trial court in ensuring a defendant's Sixth Amendment rights. In this case the trial court neither required nor encouraged the dual representation. The identity of the testimony of Andrews and Hurley made it unlikely the trial court would suspect any conflict was possible. The potential conflict standard of *United States ex rel. Hart* v. *Davenport* and *Lollar* v. *United States* was articulated in cases of joint representation where the evil of divided loyalties should have been apparent to the trial court. Dual representation is less likely to result from or come to the attention of the trial court. A more rigorous level of proof of conflict is appropriate in dual, as opposed to joint, representation cases. *Miller* v. *United States,* 564 F.2d 103, 106 (1st Cir. 1977), cert. den. 435 U.S. 931 (1978); also see *State* v. *Theodore,* 392 A.2d 122, 123 (N.H. Sup. Ct. 1978). The Supreme Judicial Court erred in not requiring the defendant to demonstrate, with a reasonable degree of specificity, that a conflict of interests actually existed at trial. See *United States* v. *Mavrick,* 601 F.2d 921, 930 (7th Cir. 1979).

Holloway v. *Arkansas* held that a defendant need not show an instance of specific prejudice when he and his counsel, by timely objection, tried to avoid the conflicts inherent in joint representation. The prejudice was presumed. 435 U.S. at 488-489. Moreover, a lack of specific prejudice was deemed to

be a consideration for harmless error, a doctrine rejected in the *Holloway* case. The Supreme Judicial Court extended the no-prejudice rule of *Holloway* to Hurley's case by flatly declaring that the lack of prejudice was not material (App. 6a). The petitioner submits that this extension of *Holloway* is erroneous and necessitates this Court's intervention.

Hurley has yet to articulate a specific instance of prejudice arising from Quarles' relationship with Andrews. Andrews' testimony was identical with Hurley's (App. 25a). Andrews gave Hurley a motive for returning to confront his victim. Quarles used his ties with Andrews to ensure the latter's appearance as a government witness, a tactic helpful to Hurley for it laid the foundation for the defense before the government concluded its case. Andrews was vigorously cross-examined by Quarles. Hurley has yet to suggest how a lawyer ignorant of Andrews could have conducted a better cross-examination.

The petitioner contends that a lack of prejudice is significant in determining whether the evidence of a conflict from dual representation is sufficient to warrant reversal under the Sixth Amendment. This consideration of prejudice is distinct from the harmless error doctrine but a counterpoint to the presumed prejudice of *Holloway* v. *Arkansas*. Post-*Holloway* cases continue to consider the question of prejudice in this light in situations where the conflict was not objected to at trial, *Scott* v. *United States*, 598 F.2d 392, 393 (5th Cir. 1979); *O'Kelley* v. *North Carolina*, 606 F.2d 56, 57 (4th Cir. 1979); *United States ex rel. Bermudez* v. *Vincent*, 472 F. Supp. 448, 450 (S.D. N.Y. 1979); *Alim* v. *Smith*, 474 F. Supp. 54, 60 (W.D. N.Y. 1979); or where the trial court severed the trial of co-defendants. *United States* v. *Mavrick*, 601 F.2d 921, 930 n.10 (7th Cir. 1979). The lack of prejudice to Hurley also raises the question of the applicability of the harmless error doctrine to this case. The Supreme Judicial Court simply

brushed aside the lack of prejudice to Hurley in its determination of what constituted a violation of the Sixth Amendment. This extension of the no-prejudice rule of *Holloway* v. *Arkansas* deserves the careful scrutiny of this Court.

The practical effect of reversing Hurley's conviction is to open the door for post-conviction claims of conflict where the only proof of conflict is the potential inhibition of defense counsel, i.e., a theoretical conflict. The seeds of a per se rule of separate representation spoken of by Justice Powell in his dissent in *Holloway* have found fertile soil in the present case. The implied mandate of separate representation contained in *Commonwealth* v. *Cobb* and *Hurley* can create chaos, for trial courts are apt not to be aware of dual representation problems at trial. The facts of this case present an opportunity for this Court to avert the problem by articulating a more rational standard of proof for post-conviction allegations of violation of the Sixth Amendment.

Conclusion.

The confusion existing among appellate courts as to the quantum of proof for a reversible conflict, the erroneous constitutional ruling by the Supreme Judicial Court, the improper extension of *Holloway* v. *Arkansas* to a case of dual representation not contested at trial, and the public interest in illuminating this rapidly developing aspect of constitutional law are sound reasons necessitating the issuance of a writ of certiorari

to review the judgment and opinion of the Massachusetts Supreme Judicial Court to the extent that the judgment reversed the conviction of defendant Hurley.

Respectfully submitted,

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Appendix.

COMMONWEALTH OF MASSACHUSETTS.
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH.

AT BOSTON, January 9, 1980.

IN THE CASE No. SJC-1736

COMMONWEALTH

vs.

DAVID A. COBB & another

pending in the Superior Court for the County of Barnstable Nos. 36192, 36195

ORDERED, that the following entry be made in the docket; viz., —

As to defendant Hurley the judgment is reversed and the verdict is set aside. He is to have a new trial. As to defendant Cobb the judgment is affirmed in accordance with the opinion.

BY THE COURT,

FREDERICK J. QUINLAN,
Assistant Clerk.

January 9, 1980.

See opinion on file.

COMMONWEALTH *vs.* DAVID A. COBB & another.

HENNESSEY, C.J. A Superior Court jury returned guilty verdicts against the defendants, David A. Cobb and John Kevin Hurley on indictments charging them with murder in the first degree of Vincent Wines. The defendants appeal, claiming several assignments of error, and also seek a reduction of the verdict or a new trial under G. L. c. 278, § 33E. We affirm the conviction of Cobb and reverse the conviction of Hurley, holding that he is entitled to a new trial because his trial counsel was inhibited in conducting Hurley's defense by a genuine conflict of interest.

The facts may be summarized briefly as follows. On January 10, 1976, a party was held at 14 Echo Road, West Yarmouth, Massachusetts, the home of Gerald and Elizabeth Kerr. Among those present were the decedent, Vincent Wines, and Michael Amano, both members of the Trampers Motorcycle Club, as well as the defendants, Cobb and Hurley, who were members of a rival motorcycle club called The Reapers. At some time during the party Amano, who was intoxicated, stumbled into Cobb, who reacted by pushing Amano and exchanging heated words with him. Wines interceded in Amano's behalf by drawing a pistol from his vest and pointing it at Cobb's face. The Kerrs quelled the disturbance and Wines put the gun away and apologized. Thereafter, Cobb and Hurley remained at the party conversing with Wines in an amiable fashion.

About midnight Cobb and Hurley, along with Hurley's girlfriend, Sally Leddy, returned to their home at 13 Gay Road, Yarmouth. The defendants then telephoned Robert Andrews, the president of The Reapers. According to Hurley's testimony, the defendants placed this telephone call in order to obtain Andrews' permission to use club funds to buy drugs from Wines.

Cobb and Hurley then returned to 14 Echo Road armed with a rifle and a shotgun. On entering the house, Hurley went into the living room to awaken Kerr, while Cobb entered the kitchen where Wines was sitting. According to Cobb's testimony he stepped into the kitchen and Wines started to reach for his gun. Cobb demanded that Wines put his gun down, and when Wines failed to comply, Cobb fired a warning shot. Cobb then reloaded the rifle and walked around the table next to Wines, repeating his demand that Wines put down his gun. Wines jumped up and seized the barrel of Cobb's rifle, precipitating a struggle for possession of the weapon. During this scuffle the rifle again discharged. Wines then gained control of the rifle and struck Cobb on the head with it. Cobb called out to Hurley for help and Wines struck him again with the rifle, knocking him to the floor. Hurley, who had been standing in the doorway, testified that he picked up his shotgun as Wines turned toward him with the rifle. In response to a verbal threat from Wines, Hurley fired his shotgun into Wines' side at close range, killing him instantly. Cobb next drew his knife and stabbed Wines in the back.

1. The defendant Hurley contends that a new trial is required because he was denied his right to effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution.[1] Hurley alleges that a conflict of interest existed because his attorney in this trial, Mr. Henry E. Quarles, Jr., also represented Robert Andrews in matters unrelated to Hurley's case prior to his appointment to represent Hurley, as well as during the trial, and after Hurley's conviction. We agree.

"Once a genuine conflict is shown, there is no additional requirement that prejudice be proved. Moreover, if a more

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[1] Hurley first raised the claim of ineffective assistance of counsel in a motion for a new trial which was denied after hearing by a judge other than the trial judge, who had retired from the court after the trial.

tenuous conflict appears, we might still reverse the judgment on a showing of material prejudice" (citations omitted). *Commonwealth* v. *Soffen*, ____ Mass. ____, ____ (1979) [Mass. Adv. Sh. (1979) 556, 560]. See *Commonwealth* v. *Leslie*, ____ Mass. ____, ____ (1978) [Mass. Adv. Sh. (1978) 2881, 2886]; *Commonwealth* v. *Bolduc*, ____ Mass. ____, ____-____ (1978) [Mass. Adv. Sh. (1978) 1727, 1740-1743]; *Commonwealth* v. *Adams*, ____ Mass. ____, ____ (1978) [Mass. Adv. Sh. (1978) 795, 806]; *Holloway* v. *Arkansas*, 435 U.S. 475, 489 (1978). The case at bar is clearly one of genuine conflict necessitating a reversal of Hurley's conviction on constitutional grounds without any showing of prejudice.

The instant case presents a more egregious situation than *Commonwealth* v. *Geraway*, 364 Mass. 168 (1973), where a borderline conflict of interest was found sufficient to warrant a discretionary reversal of a conviction under G. L. c. 278, § 33E, although a majority of the court doubted whether a constitutional violation could be made out.[2] In *Geraway*, of the six witnesses who testified to admissions by the defendant, four had been or were currently clients of the firm representing the defendant, although their matters were not related to that defense. Three of the four had been counseled by a partner about giving information to an investigating officer before trial. One of the four was himself under suspicion of having committed the murder. The partner who tried the *Geraway* case evidently was not conscious of the facts held to create the conflict. Like *Geraway*, in the instant case there was a dual representation of the defendant Hurley and the prosecution witness Andrews (who was also a potential suspect as an accessory to the crime). However, in this case, the conflict is

[2] *Geraway* was decided prior to *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), at a time when there was still "doubt whether Federal constitutional principles requir[ed] that a new trial be granted where a nonprejudicial conflict exist[ed]." *Commonwealth* v. *Geraway*, 364 Mass. 168, 174 (1973).

more palpable because the dual representation was undertaken not by a single firm but by one individual, so that there is no question of imputing knowledge of conflicting interests vicariously from one member of a firm to the other members.

An examination of both the nature of the relationship between Mr. Quarles and Andrews and the circumstances of this case demonstrates that a "genuine conflict" clearly existed. Andrews was a personal friend as well as a client of Mr. Quarles. In fact, it was through Andrews that Mr. Quarles was procured as counsel for Hurley; and it was Mr. Quarles who induced Andrews to come into court to be introduced by the prosecution as a witness in this case, obviating the necessity for a summons. Andrews was making periodic payments to Mr. Quarles of fees owed from prior and current legal representations.[3] Also, Andrews was a potential suspect as an accessory to the homicide with which Hurley was charged, as well as a suspect in illegal drug traffic related to the homicide. The potential conflict of Mr. Quarles' loyalties between Hurley and Andrews is apparent. Mr. Quarles was potentially inhibited from cross-examining Andrews in a way that would embarrass or offend him, see *Commonwealth* v. *Geraway*, 364 Mass. 168, 179 (1973) (Tauro, C.J., and Braucher, J., dissenting), and especially in a way that could incriminate him. Further, it was reasonably foreseeable before the trial commenced that Andrews might be called to testify by the prose-

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[3] Cf. *Commonwealth* v. *Soffen*, ____ Mass. ____ (1979) (Mass. Adv. Sh. [1979] 556) (convictions affirmed at least partly because, unlike this case, the relationship of the defendant's attorney to the witness or party whose interests conflicted with the defendant's had ended prior to the commencement of the attorney's representation of the defendant); *Commonwealth* v. *Wright*, ____ Mass. ____ (1978) (Mass. Adv. Sh. [1978] 2982); *Commonwealth* v. *Adams*, ____ Mass. ____ (1978) (Mass. Adv. Sh. [1978] 795); *Commonwealth* v. *Smith*, 362 Mass. 782 (1973).

cution, and that his testimony would relate to substantial rather than incidental or trivial aspects of the case.

Because we conclude that, in the circumstances shown here, this simultaneous representation of a defendant and a prosecution witness by a single attorney gives rise to a genuine conflict, the issue of prejudice drops out. Thus it is not material that the record does not show that Mr. Quarles' relationship with Andrews occasioned any actual inadequacy in his representation of Hurley. The testimony of Andrews was identical to that of Hurley. In effect, Andrews bolstered the defense's theory of the case by testifying that he gave permission to Hurley to buy drugs from Wines. Nor is this a case where Mr. Quarles was given any confidential information by Andrews that might restrict his cross-examination of Andrews. Mr. Quarles did not appear to hold back on his questioning. He even went to the point of implicating Andrews in a possible conspiracy to violate the drug laws.

Nevertheless, the logic of the rule we invoke in a case of genuine conflict is clear, viz.: the defendant is not to be put to the burden, perhaps insuperable, of probing the resolve and the possible mental conflict of counsel. Both the potential for prejudice and the difficulty of proving it are apparent, particularly as to things that may have been left not said or not done by counsel.

In summary, we have identified a genuine conflict in this case where defense counsel was attorney for a person in ongoing and substant l legal matters, whose testimony could potentially incriminate him, and who foreseeably would be produced, and was produced, as a significant prosecution witness.

Clearly the responsibility here lay with defense counsel. Although the type of conflict shown here is not precisely described in rules of the court dealing with the defense function, see S.J.C. Rule 3:22A, Standards Relating to the Defense Function DF 6, ____ Mass. ____ (1979) (mentioning only the rules

for representation of joint defendants) there was ample notice in the cautionary language of *Geraway, supra*, as well as subsequent opinions of this court. See cases cited, *supra* n.3. The reversal here fairly may be said to be the result of error of counsel, rather than judicial error. Cf. *Commonwealth* v. *Earltop*, 372 Mass. 199, 204 (1977) (Hennessey, C.J., concurring).

We turn now to the additional assignments of error argued by Hurley, since they may arise again at a new trial. We also discuss Cobb's contentions, in order to demonstrate that there was no error as to him, and that the judgments against him are to be affirmed.

2. An assignment of error argued by both Cobb and Hurley relates to the efforts of the prosecution to impeach the credibility of the witness Sally Leddy. On direct examination Leddy was questioned by the prosecuting attorney as to whether she had overheard the telephone call made by the defendants to Robert Andrews from 13 Gay Road. She responded that she did not hear the telephone conversation and that she did not know whether or not the defendants had made a telephone call from 13 Gay Road on the night of the killing. She also testified that she did not remember stating to the police that she had overheard this conversation. In order to impeach Leddy's credibility, the prosecution introduced two separate statements which she had previously made to police officers Tuttle and Sinatro. Officer Tuttle testified that Leddy had told him that she had overheard the defendants' telephone conversation with Robert Andrews in which they had asked Andrews for permission to return to 14 Echo Road in order to kill Wines. Officer Sinatro testified that Leddy had made a similar statement to him, an account of which was recorded in an affidavit for a search warrant.

The defendants offer three reasons why Leddy's prior inconsistent statements were not admissible under G. L. c. 233, § 23,

which provides: "[T]he party who produces a witness shall not impeach his credit by evidence of bad character, but may contradict him by other evidence, and may also prove that he has made at other times statements inconsistent with his present testimony; but before proof of such inconsistent statements is given, the circumstances thereof sufficient to designate the particular occasion shall be mentioned to the witness, and he shall be asked if he has made such statements, and, if so, shall be allowed to explain them." First, the defendants point to the fact that Leddy testified that she could not remember making these statements to Officers Tuttle and Sinatro. From this they argue that under *Commonwealth* v. *Chin Kee*, 283 Mass. 248 (1933), the prior statements do not qualify as "inconsistent" with Leddy's testimony. However, the defendants' reliance on *Chin Kee* is misplaced. In that case the witness's in-court testimony was that she could not recall what a previous witness had said to her outside of court. We found that impeachment of this witness with her own prior statement concerning what the previous witness had told her outside of court was improper, for the prior statement did not contradict the present testimony, i.e., a lack of memory. Leddy's present testimony regarding the telephone calls is not premised on a lack of memory, but rather on a denial that she ever overheard the conversation. Her prior statements to Tuttle and Sinatro, therefore, do contradict that denial.

The most instructive case on this point is *Commonwealth* v. *Reddick*, 372 Mass. 460, 463 (1977). In that case the witness testified that he listened on an extension during the defendant's telephone conversation, but denied hearing what the defendant said. The prosecution then read to the witness questions and answers from a statement the witness had given the police concerning the contents of the telephone call. The prosecution thus elicited testimony from the witness that he did not remember making such statements. We stated the rule that

"[w]here a party is surprised by the testimony of his own witness that he does not remember relevant facts, . . . the party will not ordinarily be allowed to introduce prior statements of the witness concerning those facts," under G. L. c. 233, § 23, "because the legitimate value of the statements as contradictions of the purported failure to remember would usually be slight, while the danger that the jury would give affirmative testimonial value to the statements would be great," quoting from *Langan* v. *Pianowski*, 307 Mass. 149, 151 (1940). We found no violation of the quoted principle because "[t]he witness went beyond saying he did not remember. He said he did not hear what the defendant said." *Id.* In the instant case Leddy testified that she could not remember making the statements to the police, but she also denied overhearing the defendants' telephone conversation. Thus this case directly parallels, and is controlled by, *Reddick*.

As a second ground for excluding the prior inconsistent statements, the defendants argue that no proper foundation was laid for their admission. We do not agree. In order for a prior inconsistent statement to be admissible under G. L. c. 233, § 23, the witness must ordinarily be apprised of the time, place, and nature of the prior statement and be given an opportunity to explain it. *Commonwealth* v. *LaFrance*, 361 Mass. 53, 57 (1972). In this case the prosecuting attorney took appropriate steps to comply with this rule.

Officer Sinatro was identified in the court room, and Leddy acknowledged that she had talked with him in the course of the investigation. The prosecutor asked her if she spoke with Sinatro at her home on Gay Road the morning after the crime. Leddy admitted she spoke with police officers at that time but did not recall speaking with Sinatro about the telephone conversation. She also admitted speaking with Officer Tuttle at the police station the day after the killing. Tuttle's police report, containing her statements, was shown to Leddy on the

stand to refresh her recollection, but she maintained that she did not remember making the statements. It was not necessary specifically to ask the witness to explain the prior statements once she had testified that she had no recollection of having made them. *Commonwealth* v. *Festa*, 369 Mass. 419, 426 (1976).

Finally, the defendants contend that although the jury were given appropriate instructions limiting the effect of the prior inconsistent statements to the impeachment of Leddy's credibility, it constituted reversible error to admit them because their prejudicial effect outweighed their impeachment value. In support of this contention, the defendants rely on *Commonwealth* v. *Pimental*, 5 Mass. App. Ct. 463 (1977) [Mass. App. Ct. Adv. Sh. (1977) 787]. In that case, a witness for the prosecution testified that she had not seen the fatal fight between the defendant and the victim. The Appeals Court ruled inadmissible an earlier statement made by this witness to the effect that she had observed the fight and that the defendant had been the aggressor throughout the entirely one-sided fray.

Pimental, however, is distinguishable from the instant case. In *Pimental* the inconsistent statement constituted the only information before the jury — other than the testimony of the defendant — going to the heart of the critical question of who had been the aggressor and who had acted in self-defense. *Id.* at ____ [Mass. App. Ct. Adv. Sh. (1977) at 793]. In contrast, there was ample evidence in the case at bar on the issue of premeditation. The motive for the killing could be inferred from the earlier confrontation between Wines and Cobb. The lapse of time from the initial confrontation to the shooting militated against a manslaughter theory. Premeditation also was suggested by the defendants' deliberate securing of guns. Moreover, there was testimony by Elizabeth Kerr that as Cobb approached Wines in the kitchen of the Kerr house, he pointed his gun at Wines and stated, "No one pushes me around." As

this review of the evidence makes clear, the potential prejudicial effect of the prior statements in this case was much less than the potential for prejudice in *Pimental*.

Pimental is further distinguished from the instant case in that here the judge gave appropriate limiting instructions to the jury, both at the conclusion of Sinatro's and Tuttle's testimony and during the final charge. In *Pimental* the judge did not give the requisite limiting instructions until five days after the statement had been admitted, thus clearly increasing the danger of prejudice.

Two additional cases in which this court approved the introduction of prior inconsistent statements for impeachment purposes lend further support to our conclusions here. In *Commonwealth* v. *Swenson*, 368 Mass. 268, 271 (1975), a prosecution witness, who was unable or unwilling to make an in-court identification of the defendant, stated that he had not previously made a photographic identification of the defendant outside the court room. We ruled that the trial judge properly admitted a police officer's testimony that the witness had made such an identification. In *Commonwealth* v. *LaFrance*, 361 Mass. 53, 57 (1972), a witness provided the defendant with an alibi to manslaughter by testifying that the defendant had been with him and not at the scene of the killing. We ruled that it was proper to impeach this witness with his prior statement that he and the defendant had been involved in the homicide. Despite the significance of identification and alibi evidence in criminal cases, we did not find that the potential prejudicial effect warranted exclusion of such statements in *Swenson* and *LaFrance*. Leddy's prior statements in this case possessed no greater potential for prejudice; therefore they were properly admitted.

3. The defendant Cobb maintains that the judge instructed the jury erroneously on the issues of intoxication, intent, self-defense, and the burden of proof. We find no such errors.

In a case replete with witnesses' references to alcohol and drugs, the judge properly decided that the jury should know the effect of intoxication on criminal responsibility. Cf. *Commonwealth* v. *King*, ____ Mass. ____, ____ (1978) [Mass. Adv. Sh. (1978) 494, 501]. He correctly stated the law that intoxication does not excuse or mitigate any crime except that one who is rendered mentally incapable of deliberate premeditation cannot be convicted of first degree murder on a theory of deliberately premeditated malice aforethought. *Commonwealth* v. *Johnson*, ____ Mass. ____, ____ (1978) [Mass. Adv. Sh. (1978) 431, 443]. The method and extent of a charge to the jury are in the judge's discretion, *Commonwealth* v. *Otero*, 356 Mass. 724 (1969), and we conclude that there was no abuse of discretion in this case.

Cobb argues further that he was prejudiced by the judge's failure to charge the jury adequately on intent as it affects a joint enterprise. The judge stated twice that "[e]ach participant must have the criminal intent to commit the specific crime with which he is charged." We find that this is a correct and adequate statement of the intent necessary to find an accomplice guilty of murder in a joint enterprise. See *Commonwealth* v. *Scanlon*, 373 Mass. 11, 12 (1977) [Mass. Adv. Sh. (1977) 1459, 1467].

The judge's charge included a thorough delineation of the possible self-defense rights of the defendants and the victims and of the right of Hurley to use force in defense of Cobb. Cobb contends that this was confusing to the jury and that the charge should have been limited to the self-defense rights of the defendants, as Cobb had requested. However, there was evidence to suggest that Wines had a right of self-defense and that Hurley might have acted in defense of Cobb. Therefore, the judge properly performed his duty in instructing the jury on these matters. See *Commonwealth* v. *Feci*, 235 Mass. 562, 569 (1920).

Cobb also contends that the charge left the burden of proof as to self-defense on the defendant. Although this case was tried prior to our decision in *Commonwealth* v. *Rodriguez*, 370 Mass. 684 (1976) (establishing that when the issue of self-defense is properly before the trier of fact, the Commonwealth must, as a matter of due process, prove beyond a reasonable doubt that the defendant did not act in self-defense), the charge complies with the rule of that case. This is demonstrated by the following excerpt from the charge: "The first thing I want to say to you about self defense is as to the burden of proof. You may have the feeling that, because the defendants basically raised the issue of self defense, they have the burden of proving it, and that's not so. The burden of the Commonwealth to prove the essential elements of the crime beyond a reasonable doubt never shifts. Part of the burden of the Commonwealth is to prove an unlawful homicide beyond a reasonable doubt. If the evidence satisfies you it was lawful homicide because there was a lawful exercise of self defense, obviously the Commonwealth has failed to prove an essential element; they have failed to prove an unlawful killing. So don't misplace the burden of proof."

Cobb argues finally that the charge also misplaced the burden of proof as to whether there was reasonable provocation of the defendant permitting a finding of voluntary manslaughter. "[W]hen there is some evidence of provocation, the Commonwealth has the burden of proving beyond a reasonable doubt that the defendant did not act in the heat of passion." *Commonwealth* v. *Greene*, 372 Mass. 517, 519 (1977). In no way did the judge's charge contravene this principle. The judge stated repeatedly that the Commonwealth bears the burden of proving every element of the offense beyond a reasonable doubt. He instructed the jury that malice is an essential element of murder, and that an intentional killing done on reasonable provocation is not done with malice and is

therefore not murder but voluntary manslaughter. Thus it is clear that the judge's charge properly placed the burden on the Commonwealth to prove the absence of reasonable provocation.

4. Cobb argues that the judge erred in admitting as evidence a photograph of the victim's heart used by the medical examiner in conjunction with his description of the damage done by the fatal gunshot. It is Cobb's contention that under *Commonwealth* v. *Richmond*, 371 Mass. 563 (1976), and *Commonwealth* v. *Allen*, ____ Mass. ____ (1979) [Mass. Adv. Sh. (1979) 863], the photograph should have been excluded because its evidentiary value was overwhelmed by its prejudicial effect on the jury. Both of those cases are clearly distinguishable from the instant case in that they involved photographs depicting post mortem damage to the victim's body caused by forces other than the defendant. Here the photograph depicted only the damage done to the heart by the defendant's gunshot. Moreover, the witness used the photograph to demonstrate where the wadding of the shotgun shell was lodged; this wadding later became part of the ballistics evidence linking the defendants to the crime. Therefore, we find that the defendant has not carried the "heavy burden" of showing that the judge abused his discretion by ruling that the photograph was not "so inflammatory in nature as to outweigh its probative value." *Commonwealth* v. *Richmond*, *supra* at 564.

5. The defendant Cobb alleges that it was error for the judge to deny motions for directed verdicts of not guilty made at the close of the Commonwealth's case on the issues of murders in the first and second degree. We find no error because "the evidence offered by the Commonwealth, together with reasonable inferences therefrom, when viewed in its light most favorable to the Commonwealth, was sufficient to persuade a rational jury beyond a reasonable doubt of the exist-

ence of every element of the crime charged." *Commonwealth* v. *Campbell*, ____ Mass. ____, ____ (1979) [Mass. Adv. Sh. (1979) 2055, 2061]. The initial confrontation between the victim and the defendants suggested a motive for the killing. The defendants' acquisition of guns and return to the Kerr home suggested premeditation, as did Elizabeth Kerr's testimony that Cobb pointed his gun at Wines and stated, "No one pushes me around." Finally, Cobb's stabbing of Wines after Hurley's devastating shotgun blast suggested that the defendants planned to kill the victim and not simply subdue him.

6. The defendant Cobb argues error resulted from the court's refusal to order the prosecution to reveal the addresses of its witnesses. In these circumstances, the judge's action may be reversed only if he abused his discretion. *Commonwealth* v. *MacDonald*, 368 Mass. 395, 397 (1975). Although it is preferable for the judge, based on representations of counsel or witnesses, to make an express finding that disclosure of the addresses would create an unwarranted threat to the safety of the witnesses, it is abundantly clear that in this case the threat was "inherent in the situation." *McGrath* v. *Vinzant*, 528 F.2d 681, 684 (1st Cir. 1976). Moreover, the denial of addresses occasioned no prejudice to the defendant. This was not a situation where the prosecution prevented defense access to witnesses, see *Commonwealth* v. *Balliro*, 349 Mass. 505, 516 (1965), for the assistant district attorney offered to make the witness available to defense counsel for an interview. Therefore, we find no abuse of discretion on the part of the judge.

Cobb argues further that there was error in the judge's refusal to order discovery of police reports including a search warrant containing the statement made by Leddy to Officer Sinatro about the defendant's telephone call. As was the case with the witnesses' addresses, the denial of discovery of police

reports was within the sound discretion of the judge. *Commonwealth* v. *Sheeran*, 370 Mass. 82, 86 (1976).

During the lobby conference regarding pretrial motions, Cobb's attorney stated to the judge that his motion to inspect statements of witnesses had been complied with. See *Commonwealth* v. *Lewinski*, 367 Mass. 889, 902 (1975) (ruling that a defendant may move for discovery of the relevant prior written statements of prosecution witnesses, and that if the motion is granted the statements must be delivered to defense counsel not later than the close of the witnesses' testimony). However, during the trial when Officer Sinatro testified to the statement Leddy made to him which was contained in the search warrant, Cobb's attorney objected on the ground that he had never received a copy of the warrant as a witness statement.

At this point, a dispute arose at the bench between the attorneys for the prosecution and the defense over whether the assistant district attorney had indeed given the document to defense counsel. The judge stated that he would consider an appropriate motion by defense counsel for relief founded on a violation of an order to provide witness statements. No such motion was ever made. Both defense lawyers were satisfied to receive a copy of the search warrant affidavit at that time. After studying the documents Cobb's lawyer declined the prosecution's offer to suspend examination of the witness. We find that, given the factual dispute, the judge did not abuse his discretion in stating that he would deal with this alleged noncompliance with discovery orders only on an appropriate motion. The defense counsel's failure to pursue this course, and his acceptance of the copy of the document and acquiescence in further examination of the witness, all serve to indicate that the present claim of error is an afterthought not worthy of our attention.

7. It follows that as to Hurley the judgment is reversed and the verdict is set aside. He is to have a new trial. The judgment as to Cobb is affirmed. Further, on consideration of the law and the evidence, we find no reason to exercise our power under G. L. c. 278, § 33E, to order a new trial or alter the verdict in Cobb's case, or grant any other relief to Hurley.

So ordered.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH
ROOM 1412 COURT HOUSE
BOSTON, MASSACHUSETTS 02108
(617) 725-8055
PATRICK J. HURLEY, *Clerk*
FREDERICK J. QUINLAN, *Assistant Clerk*

February 1, 1980

Gary A. Nickerson, Asst. Dist. Atty.
Office of the District Attorney
Cape and Islands District
Superior Court House
Barnstable, Massachusetts 02630

Dear Mr. Nickerson:

Re: Commonwealth v. Cobb et al
Supreme Judicial Court No. SJC-1736

Your Petition for Rehearing in re the above captioned case has been considered by the court and is denied.

Very truly yours,

PATRICK J. HURLEY,
Clerk

c.c.: Frederick C. Mycock, Esq.
Betsy Newell, Attorney-at-Law
Mycock, Newell & Morse
Route 6A, Barnstable 02630

John Cavicchi, Esq.
40 Court St., Boston 02108

COMMONWEALTH OF MASSACHUSETTS.
SUPERIOR COURT.

BARNSTABLE COUNTY.

COMMONWEALTH

v.

JOHN K. HURLEY.

No. 36195.

Defendant's Motion for a New Trial.

Now comes the Defendant, JOHN K. HURLEY, in the above-entitled matter and moves this Honorable Court grant him a new trial for reason that he was deprived of the effective assistance of counsel as set forth in the allegations contained below:

1. The Defendant was represented during the trial by Henry E. Quarles, Jr.

2. A Commonwealth witness, one Robert Andrews, was also represented by Attorney Henry E. Quarles, Jr., both prior to the trial, during the trial and subsequent to the trial of the Defendant. (See Page 526, Trial Transcript.)

3. That prior to and during the trial, Attorney Quarles never informed the Defendant of either the fact that he was representing Robert Andrews nor of the possible conflicts resulting from his attorney-client relationships with Robert Andrews and the Reapers.

4. That prior to and during the trial the Defendant was unaware of the conflicts existing between the representation of himself by Henry Quarles and Mr. Quarles' representations of

both the Reapers and Robert Andrews; and that the Defendant first learned of Mr. Quarles' dual representation when reading the trial transcript of the bench conference. (Page 515 of Trial Transcript.)

5. That the said Robert Andrews was and is a possible suspect in the following crimes:

a. Accessory before the fact to the murder for which the Defendant was charged.
b. Accessory after the fact for the murder in which the Defendant was charged.
c. Accessory before or after the fact to armed house invasion.
d. Accessory before or after the fact to possession with intent to sell and/or possession of harmful drugs.
e. In other related crimes committed on January 11, and during the subsequent days that followed leading up to the Defendant's turning himself in to the police.

6. During conferences, both before trial and after trial, the Defendant's attorney, Henry E. Quarles, Jr., entered into discussions of manslaughter pleas with the District Attorney's office, both First Assistant District Attorney James O'Neill and District Attorney Philip A. Rollins, concerning the possibilities of a plea to manslaughter. The Defendant was not made aware of any of these discussions and took no part in the decision-making process as to whether a plea should be entered into.

7. Because of the dual representation by Attorney Henry E. Quarles, Jr., the possibility of the Defendant becoming a State's witness was never discussed, and the conduct of the trial was such as to raise grave doubts as to the undivided loyalty of counsel.

8. That trial counsel for the defendant, Henry E. Quarles, Jr., also represented the Reapers, which the Defendant be-

lieves might be a Massachusetts corporation. (Page 497, Trial Transcript.)

9. That the interest of the Reapers who were predominantly mentioned during the trial were contrary to the interest of the Defendant.

WHEREFORE the Defendant respectfully requests this Honorable Court hold an evidentiary hearing during which the Defendant may offer evidence to the allegations contained above and grant him an opportunity to appear and testify on his behalf if it becomes necessary.

Respectfully submitted this 2d day of June, 1978.

JOHN K. HURLEY,
By his attorney:

FREDERICK C. MYCOCK

Filed June 2, 1978, and denied (Beaudreau, J.) September 15, 1978.

No. 36195.

Findings of Fact and Order.

This matter came before me on July 19, 1978, on the defendant John Kevin Hurley's motion for a new trial. The trial began before Justice Walter H. McLaughlin and a jury on June 24, 1976, ending with a verdict of guilty on July 2, 1976. Indictment number 36195 charged murder and indictment number 36196 charged being armed and entering a dwelling house.

The defendant John Kevin Hurley was tried with a co-defendant, David A. Cobb.

This hearing before me concerns the defendant John Kevin Hurley's claim that he was denied his VI and XIV Amendment Rights in that effective assistance of his counsel was lacking because of a conflict of interest on the part of his defense counsel. Between the end of the trial on July 2, 1976 and the hearing before me on July 19, 1978, Judge McLaughlin had heard a motion for a new trial while he was on the Superior Court bench with respect to other issues. The first motion before Judge McLaughlin did not raise the issues that are being raised in the motion for a new trial before me.

Upon the evidence, the trial transcripts of evidence and arguments presented at this hearing on the motion for a new trial, together with briefs submitted by the parties, I make the following findings:

1. The defendant John Kevin Hurley was represented by attorney Henry E. Quarles, Jr. of 922 Washington Street, Boston, Massachusetts. Mr. Quarles has been an attorney in this Commonwealth for about 19 years and has tried some 40 murder cases over that period of time. I find that he is a very experienced trial lawyer. The co-defendant, David A. Cobb, who is not involved in this motion for a new trial, was represented by attorney Reuben S. Dawkins. Representing the Commonwealth was W. James O'Neill, Esquire and Gary Nickerson, Esquire. Mr. O'Neill was the actual trial attorney for the Commonwealth.

2. The defendant John Kevin Hurley had been a member for two years of a motorcycle club called the Reapers Motorcycle Club, and the victim of the shooting, one Vincent Wines, was a member of a rival motorcycle club called the Trampers Motorcycle Club.

3. The issue in this motion for a new trial concerns the Government witness Robert Andrews who testified at the trial.

In substance, it is alleged that the defendant John Kevin Hurley did not know that Mr. Quarles, his attorney, was a personal friend of Robert Andrews and had represented Andrews as a client in various civil and criminal matters prior to the trial that was held in June of 1976 before Judge Walter H. McLaughlin.

4. Mr. Quarles was also the "club attorney" for the Reapers Motorcycle Club. (See Transcript, pages 512-513)

5. After the shooting, which occurred in Yarmouth, the defendant left the scene and proceeded to Carver, Massachusetts, where he contacted Robert Andrews, President of the Reapers Motorcycle Club. Acting upon Mr. Andrews' advice, the defendant Hurley caused Attorney Quarles to be contacted in his behalf. (See trial transcript, page 520)

6. There was a rule or regulation, of the Reapers Motorcycle Club, that if any of the 30 members should get into legal trouble or other trouble, the person who was in trouble was to contact the president of the Reapers Motorcycle Club in order to get any assistance that that person might need, such as obtaining a lawyer. In other words, regardless of where a member of the Reapers Motorcycle Club was, if he was in any kind of trouble, he was required to contact the president of the Reapers Motorcycle Club, which in this instance was Robert Andrews. (See trial transcript, pages 532-533)

7. In January of 1976, the United States of America had brought a complaint against Robert Andrews, alleging conspiracy. In February of 1976, Henry E. Quarles, Jr., Esquire, filed an appearance in behalf of Mr. Robert Andrews. On October 18, 1976, some four months after the trial before Justice McLaughlin, the witness, Robert Andrews, was tried in the United States District Court in Boston and was found guilty before Skinner, J. (See Exhibit no. 2)

In November of 1974, Robert Andrews was charged with assault and battery on a police officer in the Plymouth District

Court and was represented in that matter by Attorney Henry E. Quarles, Jr. (See Exhibit no. 3)

Therefore, at the time of the trial before Judge McLaughlin in June of 1976, Attorney Quarles was representing Robert Andrews in an unrelated and separate matter in the Federal District Court. Attorney Quarles had also prior to January 1976 represented Andrews in civil contract matters, that is, pertaining to a small contracting business that Andrews operated.

8. Attorney Quarles had interviewed Robert Andrews and knew the substance of his testimony relevant to the murder trial which was about Andrews being contacted by the defendant Hurley on January 12, 1976, the day of the murder of the victim, one Wines. Attorney Quarles had discussed the substance of Andrews' testimony with his client Hurley. (See page 28 of the July 19, 1978 transcript)

9. The Assistant District Attorney, Mr. O'Neill, never knew the substance of Andrews' testimony before trial as he had never talked to Robert Andrews. All Mr. O'Neill, the Assistant District Attorney, knew was that there had been a telephone call made from Yarmouth, the scene of the murder, to Carver, the location of Robert Andrews on January 12, 1976. The substance of that call was of interest to the District Attorney. (See pages 42-45 of the July 19, 1978 transcript)

10. The witness Robert Andrews was an uncooperative Government witness throughout the trial. (See page 45 of the July 19, 1978 hearing)

11. There is no question but that Attorney Quarles secured the representation of Hurley through Andrews. (See page 14 of the July 19, 1978 hearing) Hurley had paid Attorney Quarles some $215.00 to represent him in the District Court during the pending of the probable cause hearing which never took place. Upon being indicted directly by the Barnstable Grand Jury, and arraigned, Attorney Quarles was court-

appointed to represent the defendant Hurley at the oncoming trial.

12. District Attorney Mr. O'Neill and Judge McLaughlin were apprised of Mr. Quarles' relationship with Robert Andrews. (See transcript, page 526) Robert Andrews' testimony at the trial related to two conversations which he had had with the defendant Hurley. The first took place on the telephone prior to the murder, and in this conversation Hurley requested and received permission to use Club funds to purchase drugs. It was also decided that a weapon might be brought to prevent a "rip-off." (See transcript, pages 500, 503, 509-511) The second conversation took place in Carver at the location of Robert Andrews after the murder on January 12, in the early hours of January 12. It was at this time that Mr. Robert Andrews advised the defendant Hurley to get a lawyer. (See transcript, pages 519-522)

13. I find that the testimony of John Kevin Hurley was identical with that of Robert Andrews' testimony, in that it did not vary in any material way. (See transcript, pages 711-717, 731-737) Therefore, I find that there was no occasion at any time to impeach or attack the testimony of Robert Andrews at the trial as his testimony bolstered the defense theory. In short, Robert Andrews' testimony primarily concerned the substance of a phone call he received from the defendant Hurley prior to Hurley shooting the victim together with the personal conversation wherein Hurley was advised by Andrews to get a lawyer.

14. Again, to repeat the issue of this hearing before me, the defendant Hurley claims that he did not know of Mr. Quarles' representation of Robert Andrews in the past and present which he maintains deprived him of effective assistance of counsel.

15. It is clear that Attorney Quarles did not represent the witness Robert Andrews at the murder trial. Andrews himself

stated he was not represented by Attorney Quarles. (See trial transcript, page 526)

16. I find that Attorney Quarles was not constrained in his cross-examination of Robert Andrews, nor in his representation of Hurley, by any attorney-client relationship that he had had with Robert Andrews.

17. The Sixth Amendment of the Constitution guarantees an accused effective assistance for his defense and this protection is applicable to state prosecutions throughout the Fourteenth Amendment.

18. I find that each case must be viewed, however, as a whole to determine if there was behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer. *Commonwealth* v. *Saferian*, 366 Mass. at 96; *Commonwealth* v. *Adams*, 375 NE 2d at 681, 685.

19. "The process of counsel's conduct is whether it was within the range of competence demanded of attorneys in criminal cases." The test is not to be made with the advantage of hindsight, and any violation of attorney's duties must be both substantial and prejudicial. See "*U.S.* v. *Moore*, U.S. Appeals D.C., Columbia 227, 230."

20. I find that at the time of the murder trial, Attorney Quarles represented the defendant Hurley and was representing the Government witness Robert Andrews in the United States District Court in Boston. However, I specifically find that this was *dual* representation.

21. To my knowledge it has never been held that dual representation of a defendant and a Government witness is in and of itself a conflict of interest in the absence of a showing of a specific instance of prejudice which would indicate the establishment of deprivation of effective assistance of counsel. See *Commonwealth* v. *Adams*, 375 NE 2d at 687.

22. In the case before me, the defendant John Kevin Hurley has failed to demonstrate a conflict of interest or prejudice which inhibited his defense.

23. This is not a case where there was a showing that Attorney Quarles was given confidential information by Robert Andrews that might serve to restrict the cross-examination of Robert Andrews. Nowhere in the transcript do I find any indication that Attorney Quarles held back on his questioning. In fact, the questions by Mr. Quarles on cross-examination of Robert Andrews ostensibly implicated Andrews in a possible conspiracy to violate the drug laws.

24. I find no actual conflict of interest in this case.

25. With respect to the second ground argued by the defendant, namely, that there was a duty on the part of the trial judge (McLaughlin, J.) to investigate *sua sponte* that the defendant was not aware that Quarles had represented Andrews in the past and further to ascertain if there was any conflict of interest. (See trial transcript, pages 514 and 515; also pages 19, 20 and 21 together with pages 23 and 32 of the July 19, 1978 hearing before me)

I find nothing in the entire record, apart from what appears on pages 514 and 515 of the trial transcript, that would warrant a judge to conduct a *sua sponte* hearing as now requested by the defendant. I find that defendant's attorney, Quarles, was quite candid and that he represented to both the Judge and the Assistant District Attorney that Andrews had been his client. It was further intimated to Judge McLaughlin that Andrews would plead the Fifth Amendment and there was no intimation that Andrews was a willing Government witness; to the contrary, all indications were that Andrews would be favorable in his testimony to Attorney Quarles' client, John Kevin Hurley.

There were no cases or authorities brought to my attention that would require a trial judge under the circumstances revealed in the transcript of the evidence to conduct a *sua sponte* hearing with regard to the subject matter in question.

ORDER FOR JUDGMENT

Motion for new trial denied.

ROBERT H. BEAUDREAU,
Justice of the Superior Court.

Entered: September 15, 1978

Supreme Court, U. S.
FILED
MAY 27 1980
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-1557.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

JOHN KEVIN HURLEY,
RESPONDENT.

Supplemental Brief in Support of the Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

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In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-1557.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

JOHN KEVIN HURLEY,
RESPONDENT.

Supplemental Brief in Support of the Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

Introduction.

The Commonwealth's petition for writ of certiorari was docketed on April 4, 1980. On May 12th Justice Powell delivered the opinion of the Court in *Cuyler* v. *Sullivan* (No. 78-1832, 27 Cr. L. 3100). Pursuant to Rule 24(5), Rules of the Supreme Court, the Commonwealth submits this supplemental brief discussing the impact of *Cuyler* v. *Sullivan* on the present petition.

Reasons for Review.

The petition seeks to resolve the quantum of proof of a conflict of interests sufficient to deprive a defendant of effective assistance of counsel (Petition 2). The second question presented asks whether a post-trial claim of denial of effective assistance of counsel can be upheld absent a showing of specific prejudice from the conflict (Petition 2). *Cuyler* v. *Sullivan* sets forth a two-part test to determine if a conflict of interests warrants reversal of a conviction:

> "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." 27 Cr. L. 3104 (May 12, 1980).

First, an actual conflict of interests must exist, and second, the conflict must adversely affect the lawyer's performance. The questions presented in the petition can be answered through the application of the *Cuyler* test to the facts of the case at hand.

While the Supreme Judicial Court found a genuine conflict of interests confronted Attorney Quarles (Petition, A. 5A), the Commonwealth urges this Court to examine the primary facts of the case. Quarles did not represent Andrews as a witness at the trial of Hurley (Petition, A. 3a, 25a). The conflict, if any, grew out of Quarles' friendship with Andrews and his representation of the witness in other matters (Petition, A. 5a). The loyalties and duties arising from this relationship are more tenuous than those arising from the multiple representation of co-defendants tried separately as in *Cuyler* v. *Sullivan*, or together as in *Glasser* v. *United States*, 315 U.S. 60 (1942). The

Commonwealth does not concede Attorney Quarles labored under an actual conflict of interests (Petition 8-9). Granting certiorari will provide an opportunity to further define what constitutes an actual conflict.

The word prejudice in the context of a discussion of conflict of interests has been associated with harmless error, a doctrine ruled inapplicable to a conflict case in *Cuyler* v. *Sullivan*, 27 Cr. L. 3104 (May 12, 1980). The use of the word by the petitioner was not meant to limit the second question presented to an issue of harmless error. The following excerpt from the petition clarifies the scope of the question:

> "The petitioner contends that a lack of prejudice is significant in determining whether the evidence of a conflict from dual representation is sufficient to warrant reversal under the Sixth Amendment. This consideration of prejudice is distinct from the harmless error doctrine but a counterpoint to the presumed prejudice of *Holloway* v. *Arkansas*." (Petition 10.)

The determination in *Cuyler* that the conflict must adversely affect the lawyer's performance resolves the issue raised by the second question.

The Supreme Judicial Court conceded the asserted genuine conflict did not adversely affect the lawyer's performance by stating in its opinion:

> "'Thus it is not material that the record does not show that Mr. Quarles' relationship with Andrews occasioned any actual inadequacy in his representation of Hurley. The testimony of Andrews was identical to that of Hurley. In effect, Andrews bolstered the defense's theory of the case by testifying that he gave permission to Hurley to buy

drugs from Wines. Nor is this a case where Mr. Quarles was given any confidential information by Andrews that might restrict his cross-examination of Andrews. Mr. Quarles did not appear to hold back on his questioning." (Petition, A. 6a.)

In *Cuyler* v. *Sullivan*, this Court's analysis of *Glasser* v. *United States*, 315 U.S. 60 (1942), and *Dukes* v. *Warden*, 406 U.S. 250 (1972), indicates that proof of the adverse effect of the conflict should be apparent in the record of the case. 27 Cr. L. 3104. There being no evidence of an adverse effect in the present case, a writ of certiorari should issue to enable the correction of the Supreme Judicial Court's erroneous constitutional ruling.

Conclusion.

The issuance of a writ of certiorari leading to a full hearing of the case before this Court will serve to develop the important rulings set forth in *Cuyler* v. *Sullivan*. Alternatively, the granting of the petition coupled with the summary reversal of the judgment of the Supreme Judicial Court, to the extent that

the judgment reversed the conviction of the defendant Hurley, will serve to harmonize this case with the rulings of *Cuyler* v. *Sullivan*.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1979.

No. 79-1557

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

V.

JOHN KEVIN HURLEY,
Respondent.

Brief in Opposition of Petition for a Writ of Certiorari to the Supreme Judicial Court

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Commonwealth of Massachusetts

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

October Term, 1979. No. 79-1557

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

V.

JOHN KEVIN HURLEY,
Respondent.

Brief in Opposition of
Petition for a Writ of Certiorari to the
Supreme Judicial Court

The Respondent, John Kevin Hurley, respectfully prays that the Supreme Judicial Court decline to issue a Writ of Certiorari to review the judgment of the Supreme Judicial Court of Massachusetts entered in the case of Commonwealth v. John Kevin Hurley.

(a) Opinion Below.

(b) Jurisdiction.

(c) Constitution Provisions.

The Defendant, John Kevin Hurley, is satisfied with the presentation of Opinion, Jurisdiction and Constitutional Provisions made by the Petitioner as in accordance with Rule 40 (3.) of the Supreme Court Rules.

(d) Questions Presented.

(1) Has the state court decided a federal question of substance not heretobefore determined by this court?

(2) Has the state court decided a federal question of substance in a way probably not in accord with applicable decisions of this court?

(3) Should this court prohibit the state from requiring that less evidence of conflict be shown by a defendant who alleges his counsel labored under conflicting interest, than that evidence required by the Federal Courts?

(e) Statement of the Case.[1]

The Defendant, John Kevin Hurley, was represented during the trial of this case by Attorney Henry Quarles, Jr. of Boston, Massachusetts. Quarles was court-appointed counsel. At the time of his appointment,

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[1] The respondent restates the case pursuant to S.J.C. Rule 40(3) principally because of the frequent references by the Petitioner to the findings of fact and order of Superior Court on Motion for New Trial (Petition A. 21a-28a). Respondent points out for the Court that the Motion was heard anew by the Mass. S.J.C. pursuant to the prevailing Massachusetts law stated in Commonwealth v. Ella Mae Ellison at 379 N.E. 2nd 560, 568 (1978):

> "As the present defendant never had the benefit of a trial judge's consideration of her new trial request, we are in a position to make, and are bound to make, the same scrutiny of the trial record as the Judge made or should have made, who passed on the New Trial Motion and we are to apply that more liberal standard or attitude which is considered appropriate when the illness or death of a trial judge has made it necessary for the Motion to be passed second hand. 'This Court, in passing upon the questions presented for review, may consider

Mr. Quarles was attorney in fact for one Robert Andrews (NT 18).[2] Quarles was privately retained as counsel for Andrews both before, during and after his representation of the Defendant, John Kevin Hurley (NT 18-21). Quarles was also a personal friend of Andrews.[3]

Attorney Quarles was aware that his former and in fact present client, Robert Andrews, a witness for the Commonwealth was at the time of the Defendant's trial in fear of being charged as an accessory after the fact for the crime. (NT 30). At the time of the trial, Mr. Andrews and Attorney Quarles had discussions concerning his possible involvement and the possibilities of his being charged as an accessory (NT 30).

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the fact that the Judge who heard the motions had before him nothing but the stenographic report of the evidence of the trial.'"

Commonwealth v. Gedzium,
261 Mass. 299, 304, (1927). Accord
Commonwealth v. Richardson.
1 Mass. APP CT. 348 (1973)"

The findings of Judge Beaudreau were found to have been in error and should not be cited as the present facts of this case.

[2]Reference (NT) is to transcript of Hurley's Motion for New Trial 2 held on July 19, 1978.

[3]Q. (By Mr. O'Neill) "What was your relationship with Mr. Andrews?"

A. "I was his attorney, as well as the fact that he was a personal friend of mine." (NT 6)

The Defendant, Hurley, was not present during any of these discussions between Andrews and his attorney, Quarles, and Attorney Quarles never informed the Defendant that there might be any problems or conflicts (NT 28). Both the trial judge and Assistant District Attorney O'Neill trying the case for the Commonwealth were aware that Attorney Quarles was representing Mr. Andrews (NT 23 and TR 515)[4]. Quarles spent considerable court time during the trial of the case representing the interests of witness Robert Andrews, conducting negotiations on and off the record with Assistant District Attorney O'Neill and with the Trial Judge McLaughlin during the course of the trial. (TR 18-21, NT 35-42 and NT 26). Trial Judge McLaughlin, while aware of the "dual representation", failed to make any inquiry of the Defendant concerning the possibilities of conflict (NT 32). A Motion for New Trial was filed and heard by Judge Robert Beaudreau, Judge McLaughlin having retired.

(g) Argument.

In Glazer v. U.S., 315 U.S. 60 (1942); Holloway v. Arkansas, 435 U.S. 475 (1978) and more recently Cuyler v. Sullivan, 100 S. Ct. 1708 (1980), this Court has repeatedly

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[4]Reference TR is to Trial Transcript

affirmed that:

> "A Defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice to obtain relief". Cuyler v. Sullivan at 1717.

The Hurley case presents actual conflict. His attorney representing the Defendant and a witness called by the Commonwealth to testify against him.

The Petitioner has always pointed to the testimony of Andrews and argued that it "bolstered the defense of Hurley". (Petition 4). Overlooked is the fact that Andrews was called by the Commonwealth to prove that the Defendant fled to Carver from the scene of the crime, consciousness of guilt. The Trial Court, at a discussion at the bench during Andrews' testimony, told defense counsel:

> "if they leave in a van at two or three o'clock in the morning to go to Carver, I think they have got some explaining to do. Otherwise, there will be a charge on consciousness of guilt." (TR 513-514)

and in fact charged the jury:

> "The law says that, when a person has fled from the scene of a crime...the jury can infer that the attempt to hide his connection by flight or otherwise was consciousness of guilt and may be considered by a jury along with other evidence to be sufficient to establish guilt." (TR 871)

Hurley was further prejudiced by the preoccupation of his attorney with protecting Andrews. Andrews was

being investigated by the Commonwealth as a potential Defendant in this matter. (NT 34 and NT 35).

Prejudice is shown in the actual trial record when Hurley's attorney, at a pre-trial hearing on Motions, attempted to get the Court to limit the questioning of Andrews by the Commonwealth (TR 19 and TR 21), and alludes to previous off-the-record negotiations with the District Attorney,

> "that being so, I asked the District Attorney to devulge to me what he intended to question the witness about, and, if the witness was desirous of answering those questions, then we could eliminate any Fifth Amendmert problems". (TR 19).

Att. Quarles, at the Motion for New Trial, testifies:

> "I can't recall, Mr. Mycock, whether it was on the record or not. But I know I was instrumental in having him here so that he wouldn't have to be served a summons." (NT 26)

Contrary to the opinions expressed in the petition for certiorari, the ruling by the Massachusetts Supreme Judicial Court in the instant case was in conformity with Holloway and now Sullivan.

Representing both a Commonwealth's witness and the Defendant has far more potential for conflict than multiple representation. Given the relationship between the State on one hand and the Defendant on the other, any assistance given by defense counsel to the Commonwealth is inconsistent with representing the Defendant.

To indulge in niceties as to whether defense counsel spent five minutes, five hours or five days helping Andrews is to do a disservice to the Defendant who on hindsight must prove conflict from the record of his trial; there is no record of Quarles' efforts for Andrews. We can only speculate as to whether Quarles was inhibited in cross-examination of Andrews, or other witnesses who might have implicated Andrews.

Although the Respondent does not believe that the State Court's decision is in any way in disaccord with the decisions of this Court, he feels it pertinent to raise the question of State's rights to demand more responsible conduct by defense attorneys who practice before its courts.

The State Court has labeled the error in this case as error of counsel rather than judicial error (Petition A.6a,7a).

The Supreme Judicial Court Rules of the Commonwealth of Massachusetts provide in part that:

> "Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several codefendants, or one of several persons under investigation by

> law enforcement authorities for the same transaction or series of transactions, including any investigation by a grand jury, except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation. In some instances, as defined in General Rule 3:22 of this court, accepting or continuing employment by more than one defendant in the same criminal case will constitute unprofessional conduct." (S.J.C. Rule 3:22A, DF 6)[5]

Attorney Quarles failed to even notify Hurley that a conflict existed or might exist. (NT 28).

The State's expansion of the Sixth and Fourteenth Amendments protection of the Defendant's right to counsel can be compared with this Court's recent decision of Pruneyard Shopping Center v. Robins, 100 S. Ct. 2035 (1980), wherein this Court held that the State of California might have a more liberal standard towards a person's First Amendment rights to free speech in its constitution or statutes than those rights which would be guaranteed under the United States Constitution.

(h) Conclusion.

While the actual conflict demonstrated in this case should not require Hurley to prove prejudice.

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[5]Underlining supplied for emphasis

Clearly Quarles' defense was influenced to a perceptible degree by his relationship both professional and as a friend of witness and suspect Andrews. The State Court in finding "genuine conflict" saw fit to reverse without determining prejudice. While I personally would love the opportunity to argue this case before the Supreme Court, the State's decision is neither contrary to the applicable decisions of this Court nor does it present a question of substance not theretobefore determined by this Court.

Respectfully submitted,

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